# NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 21/09/2020 12:36:11 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

## Details of Filing

| | |
|---|---|
| Document Lodged: | Outline of Submissions |
| File Number: | NSD994/2020 |
| File Title: | VB LEASECO PTY LTD (ADMINISTRATORS APPOINTED) ACN 134 268 741 & ORS V WELLS FARGO TRUST COMPANY, NATIONAL ASSOCIATION (AS OWNER TRUSTEE) & ANOR |
| Registry: | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA |

Dated: 21/09/2020 12:36:16 PM AEST Registrar

## Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

IN THE FULL COURT OF THE
FEDERAL COURT OF AUSTRALIA

NSD 994 of 2020

**VB LEASECO PTY LTD & ORS**
Appellants
**WELLS FARGO TRUST COMPANY & ANOR**
Respondents

---

# RESPONDENTS' WRITTEN OUTLINE OF SUBMISSIONS

---

## A. INTRODUCTION

1. The First Respondent and Second Respondent (**Willis**) (or collectively **Respondents**) are respectively the legal and beneficial owners of four aircraft jet engines (J[1]). The engines were leased to VB Leaseco (the First Appellant) and subleased to Virgin Airlines (Second Appellant) or Tiger (the Fourth Appellant) (J[22]). Both Virgin and Tiger are "operators" for the purpose of CASA regulations who were permitted to fly the passenger aircraft on which the engines were installed, and upon whom fell obligations to maintain records in respect of the airworthiness of the engines

2. The decision of the primary judge is correct. The primary judge was right to conclude that the Court's construction of Article XI of the Convention emerged from the ordinary meaning of the words used and the objects and purpose of the Convention (J[10]). It is also consistent with the object and purpose of the implementing Australian legislation and the intention revealed by the second reading speech. The primary judge was right to conclude that the construction given to the Convention gave effect to the parties underlying bargain and provided predictability and enforceability (J[11]). That is particularly so when it is remembered that the purpose of Article A of the Aircraft Protocol was to create a regime in relation to insolvency events involving aircraft objects that is different in approach (and more beneficial to creditors) to that which may apply to other assets.

3. The Appellants make scant reference to any of the facts of the present case. Those facts underscore the correctness of the primary judge's interpretation of the Cape Town Aircraft Protocol which provides certainty to both parties in respect of the scope of the obligation in Article XI.2 to *"give possession"*, by ordering redelivery in accordance with the terms of the lease. The facts also reveal the complete impracticality of the approach urged by the Appellants.

4. The engines in question were installed "on the wing" of four separate aircraft or "airframes", being three different Virgin aircraft located in Melbourne and one located in Adelaide at the time of trial (J[36]). It was discovered during the process of recovering the engines that some of the engines were installed on aircraft operated by Tiger – who for CASA purposes was a separate "Operator" – being an entity entitled to fly passenger aircraft in Australian airspace (T9.36-T10.26).

5. Significantly, the aircraft in Adelaide was at the time of trial (although not deposed to until after the 31 July 2020 hearing) the subject of an alleged lien in favour of Adelaide airport.[1] It was conceded by the Appellants that the engine fixed to the wing of the aircraft in Adelaide could not be removed in that location but would require relocation to an airport such as Melbourne with appropriate engineering facilities.

6. The 'aircraft objects' protected by the Convention were not limited to the engines themselves. The engine records and data associated with each engine were an essential part of Willis' "*aircraft objects*" (J[26]) in respect of which it was exercising its Article XI rights under the Cape Town Aircraft Protocol.[2]

7. As the Appellants' own witness, Mr Dunbier, conceded in cross-examination (although it was not obvious from his affidavit evidence filed in support of the Appellants' case before that time), the records required by Willis were essential to the engines being redeployed for another airline. Some essential records still required staff at Virgin (being the "operator") to take active steps, for example, to certify the engine had not been in an incident or fire (T17.35-39).

8. Quite stunningly, Mr Dunbier explained in cross-examination that one of the reasons he had not provided those records was not because there was any practical difficulty in providing them, but was because he was being expressly directed by the Administrators not to provide them.[3] That was the reason the End of Lease Operator Records not been provided at the time of trial (J[48]).

9. The Appellants' had failed to give possession (on any definition) by 16 June 2020. Notably no appeal is sought from Order 2 declaring that to be the case (see J[173]). It was not until

---

[1] Algeri 5 August 2020, [11] AB Part B, Tab 23.
[2] The details of those records had been set out in Schedule 2, Paragraph 7 of the Originating Process, in respect of which Prayer 3 sought delivery up. Prayers 4A and 4B were inserted in the Amended Originating Process filed on 28 July 2020 so there could be no doubt in the Appellants minds that Willis was seeking records and data and would need the assistance of each of the Appellants.
[3] T15.15-24, AB Part C, Tab 30, page 406.

8 July 2020 (well after the Appellants' claim to have "made available" the equipment on 16 June 2020) and after the commencement of proceedings, that the Administrators provided access to the Historical Operator Records (but not the equally essential End of Lease Operator Records).[4]

10. As the primary judge found it was precisely the circumstances of the present case that the Cape Town Convention was intended to overcome (J[98]). That is, the situation where a lessor seeks the return of its property, and an administrator offers to abandon it, but refuses to provide the essential records. The Cape Town Convention imposes positive obligations on an administrator and an airline to *"give possession"* of those objects to a creditor.

11. The Appellants now urge this Court on appeal to overturn the practical and principled approach taken by the primary judge.

12. The Appellants divine additional words which they read into the text – eg "opportunity" and "make available". From those extra words they posit an altered meaning. From that altered meaning they attempt to provide an answer to the Court as how possession must be given, *"through a statement that title is yielded"*: AS[18]. The high point is that the meaning of the phrase *"give possession"* does not <u>always</u> mean physical transfer: AS[20]. So much may be assumed. But *"give possession"* does mean physical transfer in Article XI.2 where that is consistent with a contractual obligation to give possession. Such obligations, as reinforced by strong form Alternative A Cape Town insolvency regime, form the basis for the preferential cost of leasing provided by lessors.

13. Anything less would be cold comfort to Willis and any Cape Town lessor of these unique, complex and technical assets whose value is tied to their compliance with detailed air safety requirements. Such a lessor is left chasing its physical assets and vital records (in this case, with an administrator positively directing the airline operator not to give such records), and attempting to coordinate the flight of an aeroplane owned by another lessor (which Virgin is approved by CASA to fly as the "operator") to a location where the engine can be removed (being Melbourne not Adelaide). On the Appellants' case certainty is achieved only for the insolvency administrator – it can sit on its hands (contrary to J[98]), while rival lessors and creditors are left to fight it out in coordinating the removal and retrieval of their goods. This state of affairs would reduce Cape Town obligations to be the equivalent

[4] See letter dated 22 June 2020 from Clayton Utz (on behalf of the Appellants) to Norton Rose Fulbright (on behalf of the Respondents) asserting the records, and engine stands were of *"no, or minimal, use or value independently of Engines"*.

of section 443B of the Corporations Act. It would sit uncomfortably with the Article XI.5 obligations to maintain the assets which is imposed on the parties with *physical* possession. On such an interpretation the certainty required for financiers to provide preferential aircraft financing to update fleets and engines - the very purpose of the Cape Town Aircraft Protocol and the very basis upon which the Convention was given domestic legislative effect - would fall by the wayside.

## B FACTUAL BACKGROUND

**Evidence of in respect of records.**

14. First, the *'aircraft objects'* required to be returned included the records within definition of "aircraft objects", and "aircraft engines" for the purpose of Article I.2(b) (c) of the Cape Town Aircraft Protocol, the latter of which is defined as "*aircraft engines ....together with all modules and other installed, incorporated or attached accessories, parts and equipment and all data, manuals and records relating thereto*".

15. As Professor Goode explains in the Official Commentary (2019, 4ed) at [3.9]: "*Data, manuals and records relating to aircraft, airframes and aircraft engines are a vitally important part of what is included in the definitions in that without complete records the operator will be unable to obtain an airworthiness certificate*" (see also Gray, Gerber and Wool cited at J[133]).

16. That is consistent with the evidence of Willis technical specialist Garry Failler, who explained how Willis required those records in order safely to use the engines, and in the absence of which the engines' commercial value is greatly reduced.[5]

17. Mr Dunbier was the continuous airworthiness manager for Virgin. He was in his own words, the individual CASA holds responsible for the Virgin Australia Boeing 737 fleet.[6]

18. The following evidence of Mr Dunbier is essential to understanding the common basis upon which participants in the aviation industry operate.

    (a) Mr Dunbier was familiar with the requirements to maintain continuing airworthiness records (T10.31);

    (b) Whenever a component is replaced in an aircraft engine, it is a prerequisite for a part 145 (maintenance shop) organisation to document that installation (T13.4-5);

[5] Affidavit of Garry Failler affirmed 8 July 2020, [24]-[31] AB Part C, Tab 18, page 218.
[6] Affidavit of Darren Dunbier affirmed 17 July 2020, [1] AB Part C, Tab 24, page 323.

(c) It was discovered through the process of Willis being provided with records (only after the 16 June 2020 section 443B notice) that engine 896999 had at some time had a "*significant component*" replaced (being the "HMU"). Mr Dunbier accepted that the records documenting the replacement of that HMU part, had not been provided at the time of the trial (T13.10-28);[7]

(d) Mr Dunbier agreed the provision of those documents was essential to putting an engine into service, the only other method being the expensive step of "*recertification*" (T13.33-40);

(e) Mr Dunbier agreed that in the absence of Virgin receiving the very same historical records being sought by Willis, Virgin would not have been able to install the engine on aeroplanes in their fleet (T13.45). The same went for the serviceability tags (T16.1-5), where it was agreed that a serviceability tag was needed before the engine could be used again, (and therefore have any real commercial value) Mr Dunbier accepted it was a requirement of the terms of the lease to provide such a tag (although not a CASA regulatory requirement) (T17.10-18);

(f) Mr Dunbier wanted to provide all continuing airworthiness records - he understood they were of high desire for lease companies to be able to remarket their goods (T15.5-6);

(g) When taken to the records requested in paragraph 25 of Mr Failler's affidavit (Appeal Book Part C, Tab 18, page 218) and asked what would stop him from providing a "a non-incident statement", Mr Dunbier said: "*For airlines that are not in administration, that would be given as part of the end of lease process… We would engage in that in a lease return process. "We're not in a lease return process" is the guidance I'm given by our administrator, that as we are under administration, the administrator cannot incur risk or similar during the period of administration, and their guidance to me is that I cannot – cannot issue that whilst we're under administration. And my understanding is, they act as my board, and it's like an instruction from the board*" (T15.15-24);

(h) That was followed by the acceptance that if not in Administration Mr Dunbier would have provided the document as part of normal practice (T15.29). Mr Dunbier explained when asked by the primary judge that it involved his staff reviewing records

[7] After the trial, in his affidavit of 14 August 2020 at [7], Mr Dunbier deposed to the Historical Operator Records as having been provided to the Respondents by 7 August 2020 "including the work order for the replacement HMU on ESN 896999 referred to at the hearing on 31 July 2020".

to ensure the engine had not been in an incident (for example an engine fire) (T17.35-39);

(i) Mr Dunbier explained that final engine data (see Failler affidavit [25(f)] Appeal Book Part C, Tab 18, page 219) could not be given "*until you're at handover point*" (T16.33). That required the cooperation of the manufacturer working in combination with the operator, which data cannot be run in advance of their final use and again demonstrates the unique nature of the assets and the rationale for Convention protections (T17.18-28).

19. Mr Algeri's approach was significant. He was an experienced insolvency practitioner but, in his own words, he had "*not previously dealt with property subject to the Cape Town Convention*".[8] Not only was Mr Algeri unfamiliar with the Cape Town Convention, he seemed to misunderstand common practice in the aviation industry – for example, he appears to have assumed that Willis wanted one of the Administrators personally to sign off on the critical records.[9] Those records of course could only come from or be signed by the operator (Virgin or Tiger).[10]

20. Mr Algeri appeared to treat the provision of records as a bargaining chip with creditors. His evidence was that allowing Virgin (as the operator) to sign statements testifying to the status of the engines (for example as having not been in a fire) "*would expose the Administrators and the Virgin Companies to an unacceptable level of risk, where no commensurate benefit is being offered*".[11]

21. In the narrow view of the Cape Town Convention taken by the Administrators neither an airline nor administrator will have to provide records until there is some commercial benefit in it for them (ignoring, of course, the beneficial financing terms enjoyed throughout the life of the lease). In the absence of Court orders, it is clear that these Administrators would have refused to give such records.

22. In the absence of the Historical Operator Record for the HMU still outstanding at the date of trial this Court could not make any declaration that the Appellants' had given possession on any definition (cf AS[35],[36]). In the absence of the End of Lease Operator Records the Respondents consider the Appellants would still not have given possession of the

[8] Algeri 17 July 2020, [25], AB Part C, Tab 25, page 342.
[9] Algeri 17 July 2020, [36] AB Part C, Tab 25, page 345.
[10] Warner 22 July 2020, [12]-[21] AB Part C, page 226.
[11] Algeri 17 July 2020, [36] AB Part C, Tab 25, page 345.

aircraft objects, even on their own weaker "*make available*" analysis. Indeed the Court would be further reluctant to find the Respondents "*made available*" the engines, where they maintained an application for an administrator's lien over those engines up to the time of final submissions at the trial.[12]

23. Willis is and was, concerned to ensure that its engines remain of value when they are returned. It is the same concern shared by lessors around the world, who were willing to give cheaper finance over these highly technical assets on the assurance provided by the Cape Town Convention. For the reasons correctly given by the primary judge, and explained further below, the Article XI.2 "*give possession*" obligation must involve positive steps to respect the contractual obligations of the parties unless they are commercially unreasonable.

## C THE PROPER CONSTRUCTION

24. The approach of the primary judge should not be disturbed. It accords with the ordinary meaning of the words (J[92]) and respects the focus of the Convention upon enhancing rights of creditors. A number of important points about that construction are entirely absent from Appellants' construction.

25. The Appellants do not refer to the primary judge's reasons at J[107] where his Honour explained: "*the creditor's enhanced position under the Aircraft Protocol is obvious from the text of document, and its heavy reliance on the parties' contractual bargain*". The Respondents embrace his Honour's survey of the provisions of the Cape Town Aircraft Protocol that support the proposition.

26. As the primary judge observed (J[107(2)]) Art XI.5 contemplates something much more than mere disclaimer under section 443B by imposing ongoing obligations of maintenance. That is part of the protection afforded to these assets whose commercial value is tied to their regular, documented, maintenance, even following an insolvency event.

27. Of particular note are two paragraphs of Article XI which are not addressed by the Appellants (J[89]). Article XI.10 is of primary importance. It expressly preserves intact the contractual obligations of the debtor upon an insolvency event by stating that "*[n]o obligations of the debtor under the agreement may be modified without the consent of the creditor*". The construction accepted by the primary judge is entirely consistent with Article XI.10. The

[12] Appellants' Interlocutory Process filed 17 July 2020, paragraph 2, AB Part A Tab 3, page26.

Appellants' proposed construction is entirely inconsistent with that provision and modifies the *"obligations of the debtor"* to redeliver under the agreement by rendering it nugatory.

28. Second, Article XI.13 provides (via Article IX) for a restraint on a lessor who must exercise its remedy in a *"commercially reasonable"* manner. Article IX.3 operates as a safe harbour type provision for creditors, whose conduct in exercising a remedy will be *"deemed"* commercially reasonable if *"it is exercised in conformity with a provision of the agreement except where such provision is manifestly unreasonable"*, again reinforcing the manner in which the Protocol expressly gives primacy to contractual provisions.

29. The task of construction of Article XI in accordance with Article 31 of the Vienna Convention on the Law of Treaties requires meaning to be given to these provisions and the Article to be read as a whole, and in light of the object and purpose of the Convention. The construction adopted by the primary judge, in view of the clear, and undeniable, primacy given to underlying contractual obligations, promotes certainty between creditor and debtor.

30. By contrast the Appellants' construction provides almost no work for Article XI.13 because it would not apply to Article XI.2. On the Appellants' case a lessor invoking Article XI.2 is <u>not</u> "exercising" a remedy (see AS[21]). Conceptually, that appears to conflate "exercise" with performance rather than simply "invoking" or "seeking" a remedy. A plaintiff can *exercise* a right to seek delivery up. It matters not that the defendant is physically transporting the goods. As a matter of construction, it ought to be remembered that Article XI is entitled "Remedies on insolvency" (note the plural). Article XI.13 is directed to the *"exercise of any remedies under this Article"* – again plural. The Appellants' construction leads to the incongruous result that Article XI contains only <u>one</u> true *"remedy"* which must be *"exercised"* pursuant to the Article XI.13 *"commercially reasonable"* constraint which is the XI.8 (and IX(1)) additional remedy of deregistration and export (AS[26]). If that was the intended result it seems unnecessary to have included Article XI.13 in Article XI at all.

31. His Honour's review of the centrality of the underlying contract in the text of the Aircraft Protocol led to conclusion at J[108]: *It is consistent with the text and context of Art XI of the Aircraft Protocol for the Applicants to ask this Court to give effect to remedies that are in accordance with the terms of the parties' agreements, even if that comes at the cost of other creditors.* This Court would find no error in that approach.

## D PROBLEMS WITH THE APPELLANTS' CONSTRUCTION

32. The central theme of AS is that giving possession does not always require a physical act of transfer: AS[16],[18],[20],[21]. That may be accepted, although the cases in which that is a practical outcome will be rare. But that statement of legal theory does not adequately account for the very practical problem that Contracting States working with the aviation industry were attempting to solve.

33. The Appellants contend that all that was intended by Alternative A was a dispensation from a domestic moratorium (AS [25]), which is said to be the quid pro quo for an early abandonment. Such a proposition entirely diminishes the object and purpose of the Convention. It is also submitted at AS[34] that the Cape Town Protocol provides a "*self-help remedy*". Those submissions entirely ignore that the true bargain struck was the provision of substantially cheaper financing, in return for certainty to creditors.[13] Those creditors, who may not be located in the jurisdiction of any administration, require something more than mere abandonment in accordance with domestic law to navigate the complexities of disentangling their specialised equipment.

34. Turning then to the Appellants' textual arguments in respect of the wording of Article XI.2. The argument at AS[11] and [23] introduces the distinction between the "mandatory" obligation on an administrator or airline to "*give possession*", and the supposed creditor's "*(optional) remedy of 'taking possession'*. Little of substance is yielded by the distinction. But it is deployed in the final line of AS[11] in a circular fashion to assert the very thing which must be proved – and from which the Appellants' suggest the meaning of "*making available*" can be derived.

35. The complexity of that approach only needs to be stated to reveal its unattractiveness. The Appellants' approach not only sits uneasily with the ordinary meaning of the words, in truth it seeks entirely to replace and overbear that meaning. The actual words of Article XI.2 are "*give possession*" – "making available" is something far less substantive, not implying any positive obligation on the lessee, and thereby not providing the answer to the very problem the Cape Town Convention was seeking to resolve.

36. The point at AS[11] appears to be premised on the unlikely possibility (posited at AS[23]) that possession of these valuable items having properly been "given" (following the complexity of coordinating removal of engines from other lessor's aircraft, and furnishing all records etc) a hypothetical creditor may not in all cases accept possession. However,

---

[13] Commonwealth, *Parliamentary Debates*, House of Representatives, 29 May 2013, 4215 (Anthony Albanese, Minister for Infrastructure and Transport and Minister for Regional Development and Local Government).

that unlikely example is solved by Article XI.5 which releases the airline or administrator from ongoing obligations in respect of the aircraft object once they have carried out the Article XI.2 obligation, as well as protection for manifestly unreasonable actions (see: Article XI.13).

37. As to Articles XI.5, the Appellants assume wrongly (AS [12] and [19]) that the words in Article XI.2 and Article XI.5 were intended to be read interchangeably. Article XI.5 is directed to the obligation to maintain and preserve value of the aircraft objects until possession is given in accordance with Article XI.2 and does not speak to the content of the obligation in Article XI.2. Article XI.5 provides that this maintenance obligation is ongoing until the Article XI.2 obligation is fulfilled, which is when the creditor has the opportunity to "*take possession under paragraph 2* [XI.2]". While Article XI.5 refers to paragraph 2, it is not purporting to further describe, nor qualify the obligation in XI.2. The work being done by the introductory words of Article XI.5 '*unless and until*' is to specify the duration of the maintenance obligation. Rather, the "*give*" and "*take*" in Articles XI.2 and XI.5 are sequential concepts; the latter passive follows the former active obligation.[14]

38. Contrary to AS[13] the wording of Article XI.7 confirms the primary judge's approach and the Respondents' position. The Respondents agree that "give possession" in Article XI.2 is the opposite of "retain" possession in Article XI.7 (see J[94]). The Appellants appear to have abandoned an argument run below that "*give*" could be equated with "not retain".

39. The seventh reason again ignores the situation any creditor but particularly Willis in this case finds itself in (AS[28]). The fact that Alternative A requires redelivery in accordance with the terms of the contract, when that might not be obtained outside of an insolvency context under Article 10 of the Convention is explained by context in which those right are exercised.

40. In the context of a default by an airline in the ordinary course of business the creditor will have the opportunity to seek compliance with contractual redelivery obligations, or to *"take possession"* and sue for damages for the default and any loss arising from a failure to redeliver.

---

[14] See *The Leasing Centre v Rollpress Proplate* [2010] NSWSC 282, [108]-[112] where Barrett J grappled with a similar question regarding the ordinary meaning of "take" in a common law context. Barrett J concluded "take" in the context of taking delivery does not ordinarily connote active steps by the receiver (cf the stronger obligation to "*obtain*" goods described at [109], and applied at [112]). His Honour concluded at [112]: *...nor is the obligation to give possession inconsistent with and, as it were, cancelled out by the counter obligation to obtain delivery.*

41. In the case of insolvency however, the Cape Town Aircraft Protocol was intended to impose a positive obligation upon administrators or debtors in contracting States to give possession of engines (and associated records) wherever in the world they were located so that creditors can require the debtor companies or administrators to return the lessor's property. That was intended precisely to avoid recalcitrant airlines and administrators otherwise acknowledging a breach of the terms of the lease but remaining uncooperative knowing that the creditor had limited prospects of reclaiming those costs as a debt.

42. Compelling an administrator of insolvent airline to *'give possession'* is the right of greatest utility left to the creditor in an insolvency context.

43. The eighth point (AS[29]) in respect of the extrinsic material takes matters no further. The primary judge was correct to adopt a primarily textual approach and conclude that neither the US cases (J[134]), nor the travaux preparatoire (J[154]) substantially assisted in the interpretation. As to the additional "*note XIX*" now referred to AS[30] that is at best an ambivalent reference. Rather than a "note" it appears to be referring to an "Old Article" numbered "XIX" as roman numerals are not sequential. It sheds no light on the question before the Court.

44. The suggestion (AS[24]) that the very protections for aircraft lessors envisaged by the Cape Town Convention settled up by the various Contracting States, are required to be jettisoned because of a concern that Australian insolvency administrators may no longer be willing to engage in such administrations does not require a detailed response. It is an unproven consequentialist argument that does little to assist the Court's construction.

45. Redelivery to Florida (while geographically distant on the facts of the present case) is of no great normative moment – it is simply holding a lessee to its bargain, and asking the insolvency administrator to honour that bargain (as secured by the "international interest") before the claims of other creditors (see also J[90]).

## E CONCLUSION

46. The Appellants' approach is anchored in the metaphysics of property and the incidents of possession (AS[16]), but is not directed (as the primary judge was J[98]) to answering the concrete facts of the case before the Court. The Appellants' position is that the primary judge had "*no role in directing the LA or debtor to make an actual transfer*" (AS[39]), and reject the detailed work of the primary judge in trying to provide orders that would accord with the

contractual requirements for redelivery. Instead, the Appellants seek "*uniformity and predictability*" but only for insolvency administrators: AS[26].

47. In short, it is a complex exercise to give possession of aircraft engines in a manner that preserves the commercial value of those objects with documents to prove their ongoing airworthiness (along with the value of the third party airframes to which they are attached). That is why the parties turned their mind to determining a clear set of expectations for redelivery in the event of insolvency in their bargain. The primary judge's construction in picking up and applying the terms of that agreement provides the neatest solution to what is otherwise an intractable problem. It was a wholly unsurprising conclusion for the primary judge to draw.

21 September 2020

**C S WARD SC**
6 St James Hall
P: (02) 9236 8670
E: cward@stjames.net.au

**P F SANTUCCI**
New Chambers
P: (02) 9151 2071
E:santucci@newchambers.com.au